

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TRACY E. BELL)	
Claimant)	
VS.)	
)	Docket No. 1,041,047
HUNTER RECYCLING)	
Respondent)	
AND)	
)	
INSURANCE CARRIER UNKNOWN)	
Insurance Carrier)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

The Workers Compensation Fund (Fund) appealed the September 30, 2008, Order for Compensation entered by Administrative Law Judge Brad E. Avery.¹

ISSUES

Claimant alleges he injured his left shoulder on March 3, 2008, while working for Hunter Recycling. At the September 25, 2008, preliminary hearing, Jeff Hunter, who appeared as Hunter Recycling's representative, admitted that claimant's accident occurred and he also admitted that he received notice of the accident within 10 days of when it occurred.

In the Order for Compensation, Judge Avery granted claimant's requests for both temporary total disability benefits and medical benefits. Moreover, the Judge ordered the Fund to provide those benefits to claimant.

¹ The employer was not included in the certificate of service of the application for review.

The Fund, which states it was implied because the employer did not have workers compensation insurance coverage, contends Judge Avery erred.² It argues claimant gave different histories of his injury to the physicians he consulted and his testimony is inconsistent with the medical records. Accordingly, the Fund argues claimant failed to prove he sustained a compensable accident, despite the admissions of Mr. Hunter who is claimant's friend. The Fund summarizes its position, as follows:

In conclusion, the Workers Compensation Fund is entitled to a hearing on the issue of the compensability of the claim. It should not be bound by the purported admissions of the uninsured and insolvent employer. As Mr. Bell's testimony regarding the cause of his shoulder injury is not supported by timely medical record[s] created on March 13, 2008, nor by the second history presented to Dr. Mead on April 14, 2008, his testimony alone should be held to be insufficient to meet the burden of proof. The Fund prays that the Administrative Law Judge's decision finding the claim to be compensable be reversed and for such further relief as the Board feels appropriate.³

Accordingly, the Fund requests the Board to reverse the Order for Compensation and to deny claimant's requests for benefits.

Claimant, however, argues the Board has no jurisdiction for this appeal. Since Mr. Hunter admitted the accident occurred and since he authorized the medical treatment, claimant argues the only issues actually decided by the Judge were whether claimant met the definition of being temporarily and totally disabled and whether he needed medical treatment. And claimant contends "[t]hose issues can only be appealed after a regular hearing Award."⁴

Should the Board have jurisdiction for this appeal, claimant argues the Fund is bound (at least for purposes of preliminary hearing) by Mr. Hunter's admission that claimant sustained an accident at work. Conversely, if the Fund is not bound by that admission, claimant argues he has established he was injured at work on March 3, 2008, when a four-by-four piece of wood fell from a pallet and struck him. Claimant maintains the medical records support his testimony and that Mr. Hunter's admission is highly credible as it was an admission against his interests. In addition, claimant points out that

² Although the Fund was implied and represented at the hearing, the caption of the Order for Compensation did not include the Fund as a party and attorney Karns was incorrectly shown as the attorney for respondent.

³ Fund's Brief at 6 (filed Oct. 27, 2008).

⁴ Claimant's Brief at 4 (filed Nov. 17, 2008).

no one has testified to contradict claimant's testimony. In short, claimant asks the Board to either dismiss the appeal for lack of jurisdiction or affirm the Order for Compensation.

The issues before the Board on this appeal are:

1. Does the Board have jurisdiction for this appeal?
2. Is the Fund bound by Mr. Hunter's admission that claimant sustained the March 2008 accident at work?
3. If not, did claimant prove he injured his left shoulder in an accident that arose out of and in the course of his employment with respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned Board Member finds and concludes as follows:

Claimant initiated this claim against Hunter Recycling. The record does not disclose whether Hunter Recycling is a separate legal entity. Nevertheless, the business was operated by Jeff Hunter and Gail Hunter, who both appeared at the preliminary hearing pursuant to subpoena issued by the Fund.⁵ Claimant testified Mr. Hunter ran Hunter Recycling when he worked for it but Gail Hunter was running the business at the time of the preliminary hearing.

Claimant testified that on March 3, 2008, he was working for Hunter Recycling and moving items with a Bobcat when a four-by-four piece of wood slid off a pallet and hit him in the left shoulder. Claimant described the accident as follows:

Basically I was moving -- they've got big Gaylords of paper and stuff. And we pick them up with the bobcat and move them around. Well, I went to pick one up and there was some skids or pallets and four-by-fours and stuff on top of there. When I picked it up, they came back too far and one slid off and hit me in the shoulder, the 4-by-4.⁶

⁵ Neither Jeff Hunter nor Gail Hunter nor Hunter Recycling was copied on claimant's amended notice of preliminary hearing. Likewise, the Order for Compensation was not copied to the Hunters or Hunter Recycling despite their appearance at the hearing.

⁶ P.H. Trans. at 9.

Claimant sought medical treatment for his shoulder and eventually underwent left rotator cuff surgery⁷ on June 13, 2008, by Dr. Michael T. McCoy, which Mr. Hunter approved. That approval is noted by Mr. Hunter's signature on a June 4, 2008, letter from Dr. McCoy's office to Hunter Recycling in which the doctor's office indicated the cost of claimant's surgery would run from \$1,037 to \$1,651 for the doctor's charges, \$600 to \$750 for anesthesia charges, and \$11,100 to \$13,700 for hospital charges.

Claimant's testimony is uncontradicted that Mr. Hunter advised claimant that his medical bills would be taken care of. Although claimant does not remember when, Mr. Hunter advised claimant the business did not have workers compensation insurance. According to claimant, Mr. Hunter paid him \$400 per week for approximately three weeks after claimant stopped working. Those payments stopped, however, when Mr. Hunter lost control of the business due to a divorce proceeding.

Claimant testified he could not recall consulting with any doctor in the three-year period before his alleged March 2008 accident. Nonetheless, the history recorded by Dr. McCoy on March 13, 2008, indicates claimant had been having pain in his left shoulder off and on for a long period of time, which claimant testified was not entirely accurate. Additionally, Dr. McCoy's medical notes from March 13, 2008, do not reflect that claimant sustained any accident working for Hunter Recycling, to wit:

Tracy is a pleasant 46-year-old gentleman with left shoulder pain off and on for a long time. He has also had some trouble with his right shoulder but his left one bothers him more now. He used to work doing a lot of transmission work under cars but his shoulders got to bothering him so much that he now has a job where he is working down at desk level. . . .⁸

Nonetheless, Dr. McCoy's June 13, 2008, preoperative records indicate claimant "injured his left shoulder in an accident on 03/03/2008. He has had pain ever since. . . ."⁹

Likewise, the medical records from Stormont-Vail reflect inconsistent information. For example, notes dated June 30, 2008, indicate that claimant reported he injured his left shoulder at work three months earlier when a two-by-four fell off a pallet and hit his shoulder while he was driving a Bobcat. And the pre-operative history recorded by

⁷ Contrary to Dr. McCoy's initial impression that claimant merely had rotator cuff tendinitis and contrary to an MRI that indicated claimant had a partial tear of the rotator cuff, the doctor found during surgery that claimant had a significant tear from the external rotators anterior to the rotator interval and then through the rotator interval, making the tear tendon to tendon.

⁸ P.H. Trans., Resp. Ex. A.

⁹ *Id.*

Stormont-Vail reflects that claimant injured his left shoulder on March 3, 2008. But a brief notation from another document indicates claimant was hit in the arm by a pallet.

At the request of claimant's attorney, Dr. Travis R. Oller, a chiropractor, examined claimant in September 2008. The history that Dr. Oller provided in his September 24, 2008, report to claimant's attorney indicates claimant injured his left shoulder when a four-foot-long four-by-four fell from a pallet and struck him in the shoulder. Moreover, Dr. Oller's report indicated that claimant had not experienced any left shoulder complaints for 10 years before his recent accident.¹⁰

But the Fund asserts that the various medical records contain different histories about claimant's left shoulder symptoms and, therefore, claimant has failed to prove he injured his shoulder at work. For example, records from St. Francis Health Center dated April 17, 2008, indicate claimant was lifting pallets when he experienced left shoulder symptoms, that he received a cortisone shot, and then was hit in the left shoulder by a pallet. Nonetheless, those handwritten notes also state March 3, 2008, was the date of injury.

1. Is the Fund bound by Mr. Hunter's admissions?

The parties represent that claimant's employer did not have workers compensation insurance and, therefore, the Fund was brought into this proceeding. The Workers Compensation Act provides that the Fund may be ordered to pay benefits when an employer cannot be found or the employer lacks workers compensation insurance and is otherwise financially unable to pay compensation.¹¹ The Act provides the award against the Fund shall be certified to the commissioner of insurance who "shall cause payment to be made to the worker"¹² The statute that deals with insolvent employers, K.S.A. 44-532a, does not mention that the Fund has a right to defend such claim before the Judge nor does the statute indicate the Fund is entitled to intervene in the certification process. Moreover, the statute does not indicate whether or not the Fund is bound by an employer's admissions. K.S.A. 44-532a provides:

(a) If an employer has no insurance to secure the payment of compensation, as provided in subsection (b)(1) of K.S.A. 44-532 and amendments thereto, and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act, or such employer cannot be located and

¹⁰ *Id.*, Cl. Ex. 1.

¹¹ K.S.A. 44-532a.

¹² *Id.*

required to pay such compensation, the injured worker may apply to the director for an award of the compensation benefits, including medical compensation, to which such injured worker is entitled, to be paid from the workers compensation fund. Whenever a worker files an application under this section, the matter shall be assigned to an administrative law judge for hearing. If the administrative law judge is satisfied as to the existence of the conditions prescribed by this section, the administrative law judge may make an award, or modify an existing award, and prescribe the payments to be made from the workers compensation fund as provided in K.S.A. 44-569 and amendments thereto. The award shall be certified to the commissioner of insurance, and upon receipt thereof, the commissioner of insurance shall cause payment to be made to the worker in accordance therewith.

(b) The commissioner of insurance, acting as administrator of the workers compensation fund, shall have a cause of action against the employer for recovery of any amounts paid from the workers compensation fund pursuant to this section. Such action shall be filed in the district court of the county in which the accident occurred or where the contract of employment was entered into.

But K.A.R. 51-15-2 provides that the Fund is entitled to a hearing on the question of its liability under K.S.A. 44-532a and the Judge may award compensation against the Fund following a preliminary hearing if the Fund was properly impleaded and given the appropriate notice of hearing.

The parties have not cited, and the undersigned is unaware of, any statute that addresses whether the Fund is bound by an employer's admissions. Nevertheless, K.S.A. 44-534 provides the Fund may seek a hearing upon *any issue* when the parties are unable to agree in regard to benefits due an injured worker. That statute provides, in part:

(a) Whenever the employer, worker, Kansas workers compensation fund or insurance carrier cannot agree upon the worker's right to compensation under the workers compensation act or upon any issue in regard to workers compensation benefits due the injured worker thereunder, the employer, worker, Kansas worker's compensation fund or insurance carrier may apply in writing to the director for a determination of the benefits or compensation due or claimed to be due. . . .

The question whether the Fund is bound by the admissions of an employer appears to be one of first impression. As indicated above, the parties have not cited any statute or decision that has addressed the issue and the undersigned is unaware of any. Nonetheless, because the Fund is an appropriate party and entitled to a hearing in claims where the employer is both without insurance and may be unable to pay compensation and because there is no statute that binds the Fund by the admissions of an employer, the undersigned concludes that the Fund is free to adopt or reject such admissions.

Consequently, the undersigned Board Member concludes the Fund is not bound by Mr. Hunter's admission that claimant sustained an accident while working for Hunter Recycling.

2. Does the Board have jurisdiction for this appeal?

The Fund disputes that claimant sustained an accident that arose out of and in the course of his employment with Hunter Recycling. And the preliminary hearing statute, K.S.A. 44-534a, grants the Board jurisdiction to review that issue on appeal from a preliminary hearing order. The Act provides:

A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review.¹³

In short, the Board has jurisdiction over the subject matter of this appeal.

The parties did not challenge the Board's jurisdiction on other grounds. Nonetheless, the undersigned is compelled to mention a concern that could develop into jurisdictional issues depending upon whether Hunter Recycling or the Hunters are determined to be the employer(s) in this claim. The concern is that Hunter Recycling is not identified as a separate legal entity and the Hunters have not been mailed copies of some of the pleadings and notices filed in this claim. For example, the Fund attorney's entry of appearance was copied to claimant's attorney only and the claimant's amended notice of preliminary hearing was copied to only the Fund's attorney and the Judge. Moreover, the Order for Compensation and the Board's acknowledgment of receipt of the application for review do not indicate they were mailed to either Hunter Recycling or to the Hunters. And the Fund's application for review was only copied to claimant's attorney and the Judge. Indeed, the Board's briefing schedule omitted the Hunters and Hunter Recycling.

Another concern is whether Mr. Hunter's admissions at the preliminary hearing would bind the employer in this claim. As we do not know if the employer is Hunter Recycling as a separate legal entity or either or both of the Hunters, Mr. Hunter's authority to bind Hunter Recycling or Gail Hunter (who was asked to step outside the courtroom when stipulations were taken) is likewise unknown.

¹³ K.S.A. 44-534a.

Finally, the Workers Compensation Act provides that the Fund may seek reimbursement from the employer when the Fund is required to pay benefits under K.S.A. 44-532a for an employer that is without workers compensation insurance and unable to pay the workers compensation benefits that it owes. Accordingly, the financially challenged employer may wish to participate in the claim. But denying the employer notice of the proceedings deprives the employer of that opportunity.

In short, because of the question of the employer's identity and the failure to provide both Hunter Recycling and the Hunters notice of the ongoing proceedings, there are various potential issues, some of which may go to the Division's jurisdiction. Accordingly, this claim should be affirmed and remanded to the Judge to address these matters.

3. Did claimant prove he injured his left shoulder in an accident that arose out of and in the course of his employment with respondent?

At this juncture, the undersigned finds claimant established he sustained personal injury by accident arising out of and in the course of his employment with respondent on or about March 3, 2008, when a piece of wood fell from a pallet and struck his left shoulder. Claimant's testimony is credible. And Mr. Hunter admitted the accident occurred. Moreover, Mr. Hunter approved the surgery on claimant's shoulder after being advised the cost would entail several thousand dollars. The only evidence against claimant at this time is different medical records that suggest a somewhat different history of injury. But some of those medical records are inconsistent with other records from the same provider. In short, claimant has satisfied his burden of proof.

In conclusion, claimant has established that he injured his left shoulder while working for a business known as Hunter Recycling and, therefore, the Order for Compensation should be affirmed.

WHEREFORE, the undersigned remands this claim to the Judge to determine the identity of the employer and to address such other matters that may arise from that determination. The parties are directed to notify Jeff Hunter, Gail Hunter, and Hunter Recycling of the proceedings in this claim until such time as it is determined they are not entitled to notice as an employer or other indispensable party. The undersigned affirms the Judge's finding that claimant injured his left shoulder in an accident that arose out of and in the course of his employment with Hunter Recycling. The September 30, 2008, Order for Compensation entered by Judge Avery remains in effect. The Board does not retain jurisdiction over this claim.

IT IS SO ORDERED.

Dated this ____ day of December, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant
Larry G. Karns, Attorney for the Fund
Jeff Hunter, Gail Hunter, Hunter Recycling, 540 NW Broad St., Topeka, KS 66608
Brad E. Avery, Administrative Law Judge